BORA LASKIN LAW LIBRARY
3 1761 06089471 4

Materials for

INTERNATIONAL COMMERCIAL ARBITRATION (LAW 513H1F)

VOLUME II

2004-2005

Paul Michell
Faculty of Law
University of Toronto

These Materials are sold at cost and
are not to be considered as published.
They are solely for the educational
use of students at the University of Toronto
or at other educational institutions
to whom the Materials
may also be sold at cost.

FACULTY OF LAW
UNIVERSITY OF TORONTO

Materials for

INTERNATIONAL COMMERCIAL ARBITRATION (LAW 513H1F)

VOLUME II

2004-2005

Paul Michell
Faculty of Law
University of Toronto

These Materials are sold at cost and
are not to be considered as published.
They are solely for the educational
use of students at the University of Toronto
or at other educational institutions
to whom the Materials
may also be sold at cost.

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/materialsforinte02mich_1

INTERNATIONAL COMMERCIAL ARBITRATION (LAW 513H1F)
2004-2005 Materials, Volume II
Paul Michell

Table of Contents

V. ARBITRAL CONDUCT AND PROCEDURE

A. Conduct

Van Houtte, "The Conduct of Arbitral Proceedings" in Sarcevic, ed. *Essays on International Commercial Arbitration* (1989), at 113-128 1

Rubenstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions" (2004) 5 Chic. J. Int'l L. 303-310. 9

B. Delay

Fuller Austin Insulation Inc. v. Wellington Insurance Co. (1995), 23 C.L.R. (2d) 200 (Sask. C.A.) 13

C. Liability and Immunity of Arbitrators

Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982) 14

Sport Maska Inc. v. Zittrer (1988), 38 B.L.R. 221, [1988] 1 S.C.R. 564 17

D. Confidentiality

Hassneh Insurance Co. of Israel v. Mew, [1993] 2 Ll. R. 243 (Q.B.D.) 27

887574 Ontario Inc. v. Pizza Pizza Ltd. (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Comm. List] 31

Esso Australia Resources Ltd v. Plowman (1995), 183 C.L.R. 10 (Aust. H.C.) 35

Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc. (2000) 15 Mealey's Int'l Arb. Rep. B-1 (October 27, 2000, Swedish S.C.) 48

Department of Economic Policy & Development of City of Moscow v. Bankers Trust Co., [2004] EWCA Civ 314 (March 25, 2004) (C.A.) 52

VI. COURT INTERVENTION IN THE ARBITRAL PROCESS

A. Stay of Proceedings ("Referral to Arbitration")

Zodiak International Productions Inc. v. Polish People's Republic, [1983] 1 S.C.R. 529 62

Canadian National Railway Co. v. Lovat Tunnel Equipment Inc. (1999), 174 D.L.R. (4th) 385 (Ont. C.A.) 66

Nanisivik Mines Ltd. v. Canarctic Shipping Co. Ltd. (1994), 113 D.L.R. (4th) 536 (Fed. C.A.) 69

B. Protective and Preliminary Measures

Silver Standard Resources Inc. v. Joint Stock Co. Geolog (1998), 168 D.L.R. (4th) 309 (B.C.C.A.) 73

Michell, "The *Mareva* Injunction in Aid of Foreign Proceedings" (1996) 34 Osgoode Hall L.J. 741 at 751-763 81

United Nations Commission on International Trade Law, Working Group II (Arbitration), 40th Session, New York, 23-27 February 2004, Settlement of commercial disputes: interim measures of protection, Newly revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection, Doc. A/CN.9/WG.H/WP.128 88

C. Consolidation

Liberty Mutual Insurance v. QBE Insurance & Reinsurance (2002), C.C.L.I. (3d) 249 (Ont. S.C.J.) 90

D. Anti-Suit Injunctions

XL Insurance v. Owens Corning, [2000] 2 Ll. R. 500 (Q.B.D. (Comm. Ct.)) 94

E. Court Assistance in Taking Evidence—Discovery

Four Seasons Hotels Ltd. v. Legacy Hotels Real Estate Investment Trust (2003), 36 C.P.C. (5th) 138 (Ont. S.C.J.) 99

B.F. Jones Logistics Inc. and Jones v. Rolko and Decoma International Inc., August 24, 2004, Court File No. 04-CV-272467 CM3 (Ont. S.C.J.) 102

Republic of Kazakhstan v. Biedermann, 168 F.3d 880 (5th Cir. 1999) 104

VII. THE ARBITRAL AWARD

A. Place of Award

Hiscox v. Outhwaite [1992] 1 A.C. 562 (H.L.)..... 106

B. Decision Making Process

Sacheri v. Robotto (1991) XVI Y.B. Comm. Arb. 156 (It. Corte di Cass. 1989)..... 110

C. Form of Award

Bremer Handelsgesellschaft mbH v. Westzucker GmbH (No. 2), [1981] 2 Ll. R. 130 (C.A.)..... 111

Navigation Sonamar Inc. v. Algoma Steamships Ltd., [1987] R.J.Q. 1346 (S.C.).... 114

D. Interim and Final Awards

Slocan Forest Products Ltd. v. Skeena Cellulose Inc. (2001), 203 D.L.R. (4th) 216 (B.C. S.C.)..... 119

Publicis Communication v. True North Communications, Inc. 206 F.3d 725 (7th Cir. 2000)..... 121

E. Settlements and Termination of Proceedings

The Paola D'Alesio, [1994] 2 Ll. R. 367..... 123

F. Interest and Costs

Lew, "Interest on Money Awards in International Arbitration" in Cranston, ed., *Making Commercial Law: Essays in Honour of Roy Goode* (1997), at 543-569..... 126

Gotanda, "Awarding Costs and Attorney's Fees in International Commercial Arbitration" (1999) 21 Mich. J. Int'l L. 1-25 140

G. Effect of Award

Associated Electric & Gas Insurance Services Ltd. v. European Reinsurance Company of Zurich, [2003] 1 W.L.R. 1041 (P.C., appeal from Bermuda) 153

VIII. APPEAL, CHALLENGE AND MODIFICATION OF AWARDS

A. Introduction

Posner and Voser, "Should International Arbitration Awards Be Reviewable?" (2000) ASIL Proc. 126-134 158

B. Appeal

Arab African Energy Corp. Ltd. v. Olieproduckten Nederland B.V., [1983] 2 Ll. R. 419 (Q.B.D. (Comm. Ct.)) 163

Compagnie nationale Air France c. Mbaye, [2003] R.J.Q. 1040 (C.A.) 165

C. Application to Set Aside Award

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997), cert. denied, 118 S. Ct. 1042 (1998) 172

Quintette Coal Ltd. v. Nippon Steel Corp., [1991] 1 W.W.R. 219 (B.C.C.A.), leave to appeal refd, [1991] 1 S.C.R. xii 177

Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, S.p.A. (1999), 45 O.R. (3d) 183 (S.C.J.), aff'd (2000), 49 O.R. (3d) 414 (C.A.), leave to appeal ref'd, [2001] 1 S.C.R. ix 182

Noble China Inc. v. Lei (1998), 42 O.R. (3d) 69 (Gen. Div.) [Comm. List] 193

Canada (Attorney General) v. S.D. Myers, Inc., [2004] FC 38 (T.D.) 204

IX. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

A. Formalities Requirements

Proctor v. Schellenberg (2002), 30 B.L.R. (3d) 1 (Man. C.A.)..... 213

Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983) 216

Israel Portland Cement Works (Nesher) Ltd. v. Moccia Irme SpA (1993) XVIII Y.B. Comm. Arb. 419 (It. Corte di Cass. 1991)..... 219

B. Grounds for Refusal to Recognize or Enforce Foreign Arbitral Awards

1. Generally

Parsons & Whittemore Overseas Co., Inc. v. Société Generale de l'Industrie du Papier ("RAKTA"), 508 F.2d 969 (2d Cir. 1974) 220

Dunhill Personnel System Inc. v. Dunhill Temps Edmonton Ltd. (1993), 144 A.R. 272 (Q.B.)..... 224

2. art. 36(1)(a)(i) [V(1)(a)]: party to arbitration agreement under disability or agreement not valid

Shandong Textiles Import and Export Corp. v. Da Hua Non-Ferrous Metals Co. Ltd., [2002] 2 H.K.L.R.D. 844 (C.F.I.)..... 225

3. art. 36(1)(a)(ii) [V(1)(b)]: party against whom award invoked not given proper notice of appointment of arbitrator or proceedings or was otherwise unable to present case

Iran Aircraft Industries v. Avco Corp., 980 F.2d 141 (2d Cir. 1992)..... 235

Paklito Investment Ltd. v. Klockner East Asia Ltd., [1993] 2 H.K.L.R. 39 (H.C.) ... 238

4. art. 36(1)(a)(iii) [V(1)(c)]: award beyond scope of arbitration agreement/arbitrators had no jurisdiction to make award

Ministry of Public Works (Tunisia) v. Société Bec Frères (1997) XXII Y.B. Comm. Arb. 682 (Paris Cour d'Appel 1994) 243

Aamco Transmissions Inc. v. Kunz (1991), 97 Sask. R. 5 (C.A.)..... 247

5. art. 36(1)(a)(iv) [V(1)(d)]: composition of arbitral tribunal or arbitral procedure not in accordance with agreement of parties or law of country where arbitration took place

Javor v. Francoeur (2003), 13 B.C.L.R. (4th) 195 (S.C.), affd (2004), 25 B.C.L.R. (4th) 114 (C.A.) 248

China Nanhai Oil Joint Serv. Corp. Shenshen Branch v. Gee Tai Holdings Co. Ltd. (1995) XX Y.B. Comm. Arb. 671 (H.K.H.C. 1994) 253

Food Services of America Inc. v. Pan Pacific Specialties Ltd. (1997), 32 B.C.L.R. (3d) 225 (S.C.) 257

6. art. 36(1)(a)(v) [V(1)(e)]: award not yet binding on parties or has been set aside or suspended

Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir. 1999)..... 261

Rosseel NV v. Oriental Commercial & Shipping Co (UK) Ltd., [1991] 2 Ll. Rep 625 (Q.B. (Comm. Ct.))..... 263

7. art. 36(1)(b)(i) [V(2)(a)]: subject matter of dispute not capable of arbitration under law of this state

Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd. (1992), 7 O.R. (3d) 779 (Gen. Div.), aff'd (1995), 22 O.R. (3d) 576 (C.A.) 265

8. art. 36(1)(b)(ii) [V(2)(b)]: recognition or enforcement of the award would be contrary to the public policy of this state

Schreter v. Gasmac Inc. (1992), 89 D.L.R. (4th) 365 (Ont. Gen. Div.) 272

Westacre Investments v. Jugoimport-SDPR Holdings Co., [2000] Q.B. 288 (C.A.) 278

9. Other Defences to Recognition or Enforcement?

Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208 (4th Cir. 2002) 290

C. Recognition and Enforcement Under Article VII of NY Convention

Chromalloy Aeroservices v Arab Rep. of Egypt, 939 F.Supp. 907 (D.D.C. 1996).... 293

Omnium de Traitement et de Valorisation v. Hilmarton (1995) XX Y.B. Comm. Arb. 663 (Fr. Cour de Cassation 1994)); (1997) XXII Y.B. Comm. Arb. 696 (Fr. Cour de Cassation 1997)..... 297

Omnium de Traitement et de Valorisation v. Hilmarton Limited, [1999] 2 Ll. R. 222 (Q.B.D.) 299

D. Stay of Enforcement Proceedings Pending Foreign Challenge to Award

Powerex Corp. v. Alcan Inc., [2003] B.C.J. No. 1674 (S.C.) 301

Europcar Italia S.p.A. v. Alba Tours Int'l Inc., [1997] O.J. No. 133 (Gen. Div.) 304

E. State Immunity Problems

Creighton Ltd. v. Government of State of Qatar, 181 F.3d 118 (D.C. Cir. 1999) 307

International Civil Aviation Organization c. Tripal Systems Pty. Ltd., [1994] R.J.Q. 2560 (C.S.) 311

X. INVESTOR-STATE ARBITRATION

A. Generally

Paulsson, "Arbitration Without Privity" (1995) 10 ICSID Rev.—For. Inv. L.J. 232 315

B. NAFTA

Legum, "The Innovation of Investor-State Arbitration Under NAFTA" (2002) 43 Harv. Int'l L.J. 530 328

NAFTA, chapter 11 333

United Mexican States v. Metalclad Corp. (2001), 14 B.L.R. (3d) 285 (B.C.S.C.) .. 344

Mexico v. Karpa, [2003] O.J. No. 5070 (S.C.J.) 359

C. BITS

Dolzer and Stevens, *Bilateral Investment Treaties* (1995), 1-18 366

Agreement between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments, Can. T.S. 2001/4, done at Ottawa, Feb. 3, 1997, in force Jan. 30, 2001 376

D. ICSID

Settlement of International Investment Disputes Act, S.O. 1999, c. 12, Sch. D (not yet in force) 381

Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (1993), 8-15 382